

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Modesto, California

September 9, 2021 at 10:30 a.m.

1. [21-90321-E-7](#)
[SSA-1](#)

SEYMON BETMASHAL AND
RAQUEL MIRZA
Steve Altman

**CONTINUED MOTION TO COMPEL
ABANDONMENT**
7-28-21 [9]

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

Local Rule 9014-1(f)(2) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, and Office of the United States Trustee on July 26, 2021. By the court's calculation, 45 notice was provided. 14 days' notice is required.

The Motion to Compel Abandonment was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 7 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. Opposition has been filed by the Chapter 7 Trustee.

The Motion to Compel Abandonment is granted.

After notice and a hearing, the court may order a trustee to abandon property of the Estate that is burdensome to the Estate or is of inconsequential value and benefit to the Estate. 11 U.S.C. § 554(b). Property in which the Estate has no equity is of inconsequential value and benefit. *Cf. Vu v. Kendall (In re Vu)*, 245 B.R. 644 (B.A.P. 9th Cir. 2000).

The Motion filed by Seymon Betmashal and Raquel Mirza (“Debtor”) requests the court to order Sheri L. Carello (“the Chapter 7 Trustee”) to abandon property identified as:

Property Interest	Value	Lien/Encumbrance	Exemption
2014 Audi A8	\$17,000.00	Bank of the West- \$14,260.00	CCP § 703.140(b)(2)
Household belongings	\$2,000.00	\$0.00	CCP § 703.140(b)(3)
Electronics: TV	\$400.00	\$0.00	CCP § 703.140(b)(3)
Clothes	\$200.00	\$0.00	CCP § 703.140(b)(3)
Jewelry: wedding ring	\$100.00	\$0.00	CCP § 703.140(b)(4)
Cash on Hand	\$500.00	\$0.00	CCP § 703.140(b)(5)
Checking Account: Chase	\$2,430.00	\$0.00	CCP § 703.140(b)(3)
Ownership of Corporate Interest: Seymon Trucking Inc.	\$18,000.00	\$0.00	CCP § 703.140(b)(5)
Rental Deposit: Security deposit held by landlord	\$700.00	\$0.00	CCP § 703.140(b)(5)
Possible 2020 tax return	\$3,000.00	\$0.00	CCP § 703.140(b)(5)
Whole Life Insurance with AAA Life Ins. Comp.	\$2,182.00	\$0.00	CCP § 703.140(b)(7)
Debtor Seymon Betmashal’s interest in continued employment trucking company		\$0.00	Post-Petition Earnings, etc.

(“Property”).

The Declaration of Seymon Betmashal has been filed in support of the Motion and values the Property as stated in the table above.

Trustee filed an Opposition on August 2, 2021 opposing the abandonment on the basis that this request is premature as Trustee has not yet examined the Debtor under oath at Meeting of Creditors which is set for September 7, 2021. Dckt. 16.

At the hearing xxxxxxxx

~~The court finds that the property is of inconsequential value and benefit to the Estate and orders the Chapter 7 Trustee to abandon the property.~~

~~The court shall issue an order substantially in the following form holding that:~~

~~Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.~~

~~The Motion to Compel Abandonment filed by Seymon Betmashal and Raquel Mirza, the Debtors, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,~~

~~**IT IS ORDERED** that the Motion to Compel Abandonment is granted, and the Property identified as:~~

Property Interest
2014 Audi A8
Household belongings
Electronics: TV
Clothes
Jewelry: wedding ring
Cash on Hand
Checking Account: Chase
Ownership of Corporate Interest: Seymon Trucking Inc.
Rental Deposit: Security deposit held by landlord
Possible 2020 tax return
Whole Life Insurance with AAA Life Ins. Comp.

Debtor Seymon Betmashal's interest in
continued employment trucking company

~~("Property").~~

_____ and listed on Schedule A / B by Debtor is abandoned by the Chapter 7 Trustee, Sheri L. Carello ("Trustee") to Seymon Betmashal and Raquel Mirza, the Debtors, by this order, with no further act of the Trustee required.

FINAL RULINGS

2. [20-90645](#)-E-7
[BLF](#)-4
2 thru 3

MOHIT RANDHAWA
David Johnston

MOTION TO COMPEL
8-5-21 [\[105\]](#)

Final Ruling: No appearance at the September 9, 2021 hearing is required.

Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on August 5, 2021. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

The Motion for Turnover has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Turnover is granted.

Gary Farrar, the Chapter 7 Trustee, ("Movant") in the above entitled case and moving party herein, seeks an order for turnover as to the real property commonly known as 1408 Horizon Lane, Patterson, California ("Property"). Moreover, Trustee seeks for Debtor to immediately turn over the Property and to vacate the Property within 14 days of entry of the court's order.

According to the Trustee, the Chapter 7 debtor, Mohit Singh Randhawa ("Debtor"), has refused to cooperate with Trustee and his realtor in their efforts to inspect, value, and list and market the Property for sale. Declaration, Dckt. 107. Trustee further testifies that he believes the sale of the Property will produce significant value to the estate for the benefit of creditors. *Id.*

DISCUSSION

11 U.S.C. § 542 and Federal Rule of Bankruptcy Procedure 7001(1) permit a motion to obtain an order for turnover of property of the estate if the debtor fails and refuses to turnover an asset voluntarily. Federal Rule of Bankruptcy Procedure 7001(1) defines an adversary proceeding as,

(1) a proceeding to recover money or property, other than a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under § 554(b) or § 725 of the Code, Rule 2017, or Rule 6002.

In this case, Movant has initiated this proceeding to compel Mohit Singh Randhawa (“Debtor”) to deliver property to Movant. The Federal Rules of Bankruptcy Procedure permit the trustee to obtain turnover from Debtor without filing an adversary proceeding. This Motion for injunctive relief, in the form of a court order requiring that Debtor turnover specific items of property, is therefore appropriate under Federal Rule of Bankruptcy Procedure 7001(1).

The filing of a bankruptcy petition under 11 U.S.C. §§ 301, 302 or 303 creates a bankruptcy estate. 11 U.S.C. § 541(a). Bankruptcy Code Section 541(a)(1) defines property of the estate to include “all legal or equitable interests of the debtor in property as of the commencement of the case.” If the debtor has an equitable or legal interest in property from the filing date, then that property falls within the debtor’s bankruptcy estate and is subject to turnover. 11 U.S.C. § 542(a).

A bankruptcy court may order turnover of property to debtor’s estate if, among other things, such property is considered to be property of the estate. *Collect Access LLC v. Hernandez (In re Hernandez)*, 483 B.R. 713 (B.A.P. 9th Cir. 2012); *see also* 11 U.S.C. §§ 541(a), 542(a). Section 542(a) requires someone in possession of property of the estate to deliver such property to the trustee. Pursuant to 11 U.S.C. § 542, a trustee is entitled to turnover of all property of the estate from a debtor. Most notably, pursuant to 11 U.S.C. § 521(a)(4), Debtor is required to deliver all of the property of the estate and documentation related to the property of the estate to the Chapter 7 Trustee.

No opposition has been filed to this Motion by Debtor or any other party in interest.

Enforcement of Turnover Orders

Though the court does not anticipate there being any failure by Debtor to comply with the order of this court, the Ninth Circuit has reaffirmed a bankruptcy judge’s power to issue corrective sanctions, including incarceration, to obtain a person’s compliance with a court order. *Gharib v. Casey (In re Kenny G Enterprises, LLC)*, No. 16-55007, 16-55008, 2017 U.S. App. LEXIS 13731 (9th Cir. July 28, 2017). Though an unpublished decision, *Gharib* provides a good survey of the reported decisions addressing the use of corrective sanctions by an Article I bankruptcy judge. *Id.* at *2–5.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Turnover of Property filed by Gary Farrar, the Chapter 7 Trustee, (“Movant”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion for Turnover of Property is granted.

IT IS FURTHER ORDERED that Mohit Singh Randhawa (“Debtor”), and each of them, shall deliver on or before **noon on September 30, 2021**, possession of the real property commonly known as 1408 Horizon Lane, Patterson, California (“Property”), with all of their personal property, personal property of any other persons that Debtor, and each of them, allowed access to the Property; and any other person or persons that Debtor, and each of them, allowed access to the Property removed from the Property.

3. [20-90645-E-7](#)
[BLF-5](#)

MOHIT RANDHAWA
David Johnston

**OBJECTION TO HOMESTEAD
EXEMPTION**
8-5-21 [[112](#)]

<p>The hearing on the Objection to the Homestead Exemption has been continued to 10:30 a.m. on September 30, 2021.</p>

Final Ruling: No appearance at the September 9, 2021 hearing is required.

The Order to Show Cause was served by the Clerk of the Court on Debtor, and Chapter 13 Trustee as stated on the Certificate of Service on August 22, 2021. The court computes that 18 days' notice has been provided.

The court issued an Order to Show Cause based on Debtor's failure to pay the required fees in this case: \$338.00 due on August 6, 2021.

The Order to Show Cause is discharged, and the bankruptcy case shall proceed in this court.

The court's docket reflects that the default in payment that is the subjection of the Order to Show Cause has been cured.

The court shall issue a order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Order to Show Cause having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Order to Show Cause is discharged, no sanctions ordered, and the bankruptcy case shall proceed in this court.

5. [18-90029-E-11](#)
[FWP-16](#)

JEFFERY ARAMBEL
Michael St. James

**MOTION TO EMPLOY WEST
AUCTIONS, INC. AS AUCTIONEER,
AUTHORIZING SALE OF PROPERTY AT
PUBLIC AUCTION AND AUTHORIZING
PAYMENT OF AUCTIONEER FEES AND
EXPENSES AND/OR MOTION
AUTHORIZING THE SALE OF ESTATE
ASSETS BY AUCTION, MOTION
AUTHORIZING THE ABANDONMENT
OF ANY FARM EQUIPMENT NOT SOLD
AT AUCTION
8-12-21 [[1500](#)]**

Final Ruling: No appearance at the September 9, 2021 hearing is required.

Local Rule 9014-1(f)(2) Motion—Hearing Not Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on August 12, 2021. By the court's calculation, 28 days' notice was provided. 21 days' notice is required. FED. R. BANKR. P. 2002(a)(2) (requiring twenty-one days' notice).

The Motion to Sell Property was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 11 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further.

The hearing on the

**Motion to Employ,
Motion to Sell Property by Auction, and
Motion to Abandon Equipment is**

has been continued to 10:30 a.m. on September 30, 2021.

The Plan Administrator shall file and serve supplemental pleadings and properly authenticated and admissible evidence addressing the issues concerning the terms of employment by the Auctioneer (which would allow additional compensation to be paid outside of that permitted by 11 U.S.C. §§ 327, 328, 330); and documentation of the liens for which relief pursuant to 11 U.S.C. § 363(f) is requested.

The court, pursuant to Federal Rule of Bankruptcy Procedure 9014(c) authorizes the combining of the three different requests for relief in one motion.

Focus Management Group USA, Inc. (“Plan Administrator”) requests multiples level for relief through this one Motion.

The first being to employ an auctioneer pursuant to 11 U.S.C. § 327 so that the auctioneer may assist the Plan in liquidating the estate’s interest in certain farm equipment.

The second motion is for the sale of property of the estate free and clear of liens and other interests as provided in 11 U.S.C. § 363, specifically certain farm equipment via auction.

Lastly, the third motion is for authorization to abandon any farm equipment not sold at auction pursuant to 11 U.S.C. § 554(a) on the grounds that the unsold farm equipment will be burdensome or of inconsequential value to the bankruptcy estate. The court will take each relief requested in turn below.

The court notes that Local Bankruptcy Rule 9014-1(d)(5) states that “[e]very application, motion, contested matter or other request for an order, shall be filed separately from any other request, except (1) that relief in the alternative based on the same statute or rule may be filed in a single motion; and (2) as otherwise provided by these rules.” Federal Rule of Civil Procedure 18, which is incorporated into adversary proceeding practice by Federal Rule of Bankruptcy Procedure 7018, is not incorporated into Federal Rule of Bankruptcy Procedure 9014(c). No request has been made by the Plan Administrator for the court to make Rule 18/7018 applicable in this Contested Matter.

FIRST CLAIM FOR RELIEF REQUESTED EMPLOYMENT OF AUCTIONEER

The Plan Administrator seeks to employ West Business Holdings, Inc. dba West Auctions, Inc., (“Auctioneer”) pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code §§ 327, 328(a) and 330. Plan Article IX authorizes the Plan Administrator to employ professionals without Bankruptcy Court approval. However, the Plan Administrator notes for the court that the Plan Administrator seeks the authorization to employ Auctioneer since its employment is integral to the proposed auction of the Farm Equipment subject of the Plan Administrator request for authority to sell such property.

Plan Administrator argues that Auctioneer’s appointment and retention is necessary to assist Plan Administrator in liquidating the estate’s interest in certain farm equipment via online auction. The Plan Administrator believes it is in the best interest of the estate to employ West Auctions because West Auctions is experienced in sales of property like the Farm Equipment and is able to expose the Farm Equipment to a large number of prospective purchasers. As a result, the Plan Administrator is confident that West Auctions’ efforts will enable the estate to obtain the greatest possible return for the Farm Equipment. Schwartzkopf Declaration, Dckt. 1502, ¶ 6.

As stated in the Agreement, Auctioneer agrees to advertise the Property for auction and to make an earnest and good faith effort to sell the Property as agreed upon with the Plan Administrator. The Property may be sold in bulk, piecemeal, or in such lots as Auctioneer may reasonably determine, in consultation with the Plan Administrator. Further, Plan Administrator has agreed to pay Auctioneer as follows:

- a. (1) 20% of the gross sales proceeds of the Personal Property, or any portion thereof; or (2) Three Thousand Five Hundred and No/100ths Dollars (\$3,500.00). Said fee shall be paid whether the buyer is found by Auctioneer or by the undersigned Seller or by any other person.
- b. At no expense to Seller, Auctioneer reserves the right to initiate a buyer's premium and it will not be considered a part of Auctioneer's brokerage fee or gross sales proceeds. Buyer's premium shall not exceed 14% and shall be reduced to 10% for Buyers who pay with certified funds.

Agreement, Dckt. 1504, at ¶ 3.

Auctioneer will disburse the fees and costs set forth in paragraph 3 above to Auctioneer from the gross sales proceeds; and within two (2) business days of receipt of funds for the entire purchase price from the purchaser of the Property, Auctioneer will provide an accounting to the Plan Administrator along with the distribution of the net proceeds. *Id.*, at ¶ 6.

The Agreement further provides that if the Plan Administrator breaches the Agreement, then Auctioneer shall received \$15,000 as liquidated damages as the “reasonable estimate of the amount of such damages.” *Id.*, ¶ 10. With a 20% “commission” and an additional 14% “buyers premium,” the Plan Administrator and Auctioneer are projecting gross sales proceeds of \$44,117 ($\$44,117 \times 34\% = \$14,999.78$).

Donna Bradshaw, a Owner and Operator of West Auctions, Inc., testifies she and the company do not represent or hold any interest adverse to Debtor or to the Estate and that they have no connection with Debtor, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

Pursuant to § 327(a), a trustee or debtor in possession is authorized, with court approval, to engage the services of professionals, including attorneys, to represent or assist the trustee in carrying out the trustee's duties under Title 11. To be so employed by the trustee or debtor in possession, the professional must not hold or represent an interest adverse to the estate and be a disinterested person.

Section 328(a) authorizes, with court approval, a trustee or debtor in possession to engage the professional on reasonable terms and conditions, including a retainer, hourly fee, fixed or percentage fee, or contingent fee basis. Notwithstanding such approved terms and conditions, the court may allow compensation different from that under the agreement after the conclusion of the representation, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of fixing of such terms and conditions.

Amount of Compensation

In reviewing the terms of employment, the compensation for the Auctioneer causes the court concern. On its face, the terms are stated to be that only a twenty percent (20%) commission will be taken by the auctioneer. However, it is further stated (subject to the certifications of the Plan Administrator and counsel pursuant to Federal Rule of Bankruptcy Procedure 9011)

18. With respect to the 14% buyers' premium, the Bradshaw Declaration sets forth the basis for the determination that such fees are customary in the industry and are reasonable under these circumstances (again, they are charged to the buyers, and not included in the gross proceeds to be remitted to the bankruptcy estate). Specifically, Bradshaw has represented that the buyer's premium is an industry-standard charge that the majority of auction firms use, and has been in practice since the 1970's. Such a premium can range anywhere from 10% - 25% and is added to the final purchase price. In Bradshaw's experience, auction bidders are familiar with this practice, and the buyer's premium is prominently disclosed in all of West Auctions' advertising. The buyer's premium in part covers the auctioneer's administrative costs, including insurance, bonds, administrative staff and other expenses that are not passed on to the seller. It also covers the fees involved with an online auction. Bradshaw Decl. ¶ 11

Motion, ¶ 18, Dckt. 1500.

In the Agreement, the Plan Administrator and Auctioneer state that "At no expense to [Plan Administrator], Auctioneer reserves the right to initiate a buyer's premium and it will not be considered a part of Auctioneer's brokerage fee or gross sales proceeds. Buyer's premium shall not exceed 14%" Agreement, ¶ 3.b; Exhibit B, Dckt. 1504.

In substance, the Plan Administrator and Auctioneer represent to the court that if the Auctioneer adds a premium of 14% to the sales price that is taken through the side door (as in not part of the compensation allowed a professional subject to review under 11 U.S.C. § 328), it has no effect on the sales price and doesn't "cost" the Plan Administrator (and creditors) anything.

With a projected sales price (based on the good faith estimate of liquidated damages) of \$44,117, in addition to \$8,823.40, Auctioneer will be paid an additional \$6,176.38 through the side, non-11 U.S.C. § 328 side door. Almost half of what Auctioneer is to receive is structured to be beyond the statutory protections and requirements enacted by Congress.

While stating that the 14% through the non-11 U.S.C. § 328 side door isn't a cost to the Plan Administrator, such belies basic transactional economics. If the property is worth \$44,117 and is being sold for its fair market value, with the commission paid by seller from the proceeds, then the buyer pays \$44,117. If the buyer has to pay an additional 14% to Auctioneer, then such amount will reduce the purchase price that a commercially reasonable buyer is willing to pay, and not increase the fair market value of the property being sold.

If there are reasonable fees and expenses to be paid Auctioneer for service to be provided as a professional hired by, and owing its fiduciary duties to, the Plan Administrator, then such amounts need to be clearly stated and paid by the Plan Administrator. If there is "extra" commission being paid the professional employed by the Plan Administrator, such need to be clearly stated and paid by the Plan Administrator. Further, such fees and expenses must be allowed pursuant to 11 U.S.C. § 330 and subject to review, if appropriate, as provided in 11 U.S.C. § 328.

The court discusses these points and the statutory requirements not because it questions the ethics and good faith of the Plan Administrator, Auctioneer, or Plan Administrator's Counsel, but in recognition of persons out there in the world who do not have such ethical standards and laws have been enacted to address. These laws are not selectively applied only to the "bad guys," with the court ignoring the law for "favored" parties and counsel. The court is confident that the Parties can think of attorneys, auctioneers, and other "professionals" in the bankruptcy world that they know these laws have been enacted to address.

In the past decade this court has had fiduciaries of the bankruptcy/plan estate (as is the Plan Administrator) hire professionals who have a fiduciary duty to the bankruptcy/plan estate (as is the Auctioneer) to provide fair compensation, payment of reasonable identified expenses, pre-approved contingency amounts, and the ability to adjust such amounts upwards for the professional in the event that the reasonably negotiated expenses turn out to be unreasonably low based upon unforeseen expenses.

Before ruling on this Motion, the court affords the Plan Administrator to supplement the record and comply with the Bankruptcy Code and disclose all of the fees and expenses (which may be a fixed amount or percentage as stated in good faith) and any amendments to the Agreement for employment of the Auctioneer.

Additionally, the parties can reflect on whether a professional authorized to be employed for the bankruptcy estate by a debtor in possession or plan administrator, to be paid compensation in fulfilling the fiduciary duties of that professional to the bankruptcy/plan estate, can also be getting paid by the other party to the transaction.

SECOND CLAIM FOR RELIEF SALE OF PROPERTY BY AUCTION

The Bankruptcy Code permits the Plan Administrator in this case to sell property of the estate after a noticed hearing. 11 U.S.C. § 363. Here, Movant proposes to sell the property identified as:

Arambel Farm Asset List (Approximate Units) As of 3/31/21		
	Salable Items	Total
	New Holland TC-30 Tractors	123
	John Deere Tractors	20
	Caterpillar Tractors	3
	Plastic Irrigation Pipe	400
	Steel Irrigation Pipe	75
	Pickup Trucks	8
	Toyota Camry	1
	Aluminum Fruit Ladders	1500
	Bin Trailers	40
	Fruit Trailers	2
	Fuel Trailers	1
	Spray Trailers	3
	Flatbed Trailers	120
	Plow Trailers	13
	Mobile Trailers	3

(“Property”). Plan Administrator proposes the sale be made via online auction with West Auctions, Inc. as the Auctioneer as stated above.

Sale Free and Clear of Liens

The Motion seeks to sell the Property free and clear of the senior lien of Summit (“Creditor”). The Motion also seeks to sell free and clear of liens of Ingram Creek Restaurant and National Funding, Inc., who may hold a junior lien on one or more items of the Property. The Bankruptcy Code provides for the sale of estate property free and clear of liens in the following specified circumstances,

(f) The trustee[, debtor in possession, or Chapter 13 debtor] may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if–

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f)(1)–(5).

For this Motion, Movant has established, according to the Plan Administrator's Declaration that the net proceeds of the sale will be payable to Summit. As to the potential liens of Ingram Creek Restaurant and National Funding, Inc., the Plan Administrator argues that neither the Schedules nor the Plan identified any such interest, and even if such Junior Interests exist, the amount owed to Summit secured by the Property greatly exceeds the value of the Property and Summit's financing statements were recorded prior to the junior interests. Therefore, Summit holds the senior secured interests in the Property and there is no equity in the Property for the junior interests.

While arguing that no such value exists for the junior lien creditors, the Plan Administrator does not direct the court to any order of this court valuing the Ingram Creek Restaurant and National Funding, Inc. secured claims as \$0.00 as provided in 11 U.S.C. § 506(a).

Much of the Plan Administrator's arguments are based on the Debtor (who was removed from this case from participating in the administration of the plan due to misconduct) as being the basis for disputing the claim. Additionally, because creditors did not file a proof of claim, such is effectively *prima facie* evidence that the claim may be disputed.

Debtor's good faith and credibility has been cratered by his conduct in this case and it is curious that the Plan Administrator now embraces him as "evidence" of a dispute. The Plan Administrator's assertion that an absence of a proof of claim is *prima facie* evidence that it is in dispute flies in the face of what the United States Supreme Court requires in Federal Rule of Bankruptcy Procedure 3002(a) which provides, "A lien that secures a claim against the debtor is not void due only to the failure of any entity to file a proof of claim."

The above dispute contention is based merely because the Plan Administrator is "informed and believes." The court will not destroy property rights using 11 U.S.C. § 363(f) merely because someone is informed that if they believe they dispute the lien the lien disappears.

The Plan Administrator also seeks relief based on the junior lien interest being subject to applicable state law allowing it to be "wiped out" by a sale of the collateral by a senior lien holder. The Plan Administrator cites the court to the Ninth Circuit decision in *Pinnacle Res. At Big Sky, LLC v. CH SP Acquisitions, LLC (In re Spanish Peaks Holdings II, LLC)*, 862 F.3d. 1148, 1157 (9th Cir. 2017), for the proposition that nonbankruptcy foreclosure sale law is a basis for the sale of property free and clear of a junior interests (in *Spanish Peaks Holding II, LLC* it was a lease of real property) pursuant to 11 U.S.C. § 363(f)(1), which provides "(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;"

The Plan Administrator is correct in asserting that under the California Commercial Code a senior lien holder may sell collateral free and clear of a junior lien. Though not cited in the Points and Authorities, the legal basis for this conclusion include:

§ 9610. Disposition of collateral after default; Treatment of warranties

(a) After default, a secured party may sell, lease, license, or otherwise dispose of any or all of the collateral in its present condition or following any commercially reasonable preparation or processing. . .

§ 9617. Rights of transferee of collateral

(a) A secured party's disposition of collateral after default does all of the following:

- (1) Transfers to a transferee for value all of the debtor's rights in the collateral.
- (2) Discharges the security interest under which the disposition is made.
- (3) Discharges any subordinate security interest or other subordinate lien.

(b) A transferee that acts in good faith takes free of the rights and interests described in subdivision (a), even if the secured party fails to comply with this division or the requirements of any judicial proceeding.

For the remaining subordinate secured claim, Movant has stated grounds showing that under California law the Property may be sold free and clear of the subordinate lien, with the lien attaching to the sale proceeds, if any remain after payment of the senior lien, to the same extent, validity, and priority as they existed in the Property sold pursuant to order of the court.

Unfortunately, the Plan Administrator has not provided evidence of the asserted subordinate liens of Ingram Creek Restaurant and National Funding, Inc. In Juanita Schwartzkopf's Declaration, she testifies under penalty of perjury, based on her personal knowledge (Fed. R. Evid. 601, 602) on this "fact:"

15. The report of Secretary of State's lien records for Mr. Arambel also identifies the following potential interests in the Farm Equipment (collectively, the "Junior Interests"):

- a. A security interest asserted by Ingram Creek Restaurant in "All present and future assets of the Debtor"; This financing statement was recorded on September 13, 2016.
- b. A security interest asserted by National Funding, Inc. as a Judgment Lien. This judgment lien was recorded on November 7, 2016.

16. Each of the Junior Interests were recorded after Summit's UCC-1's. Therefore, the Plan Administrator seeks to sell the Farm Equipment free and clear of the Junior Interests with the net proceeds of the sale payable to Summit.

Dec. ¶ 15; Dckt. 1502.

In substance, the testimony by Ms. Schwartzkopf is that she "heard" the Secretary of State Report "say" when she read it, that the financing statement and judgment lien were recorded on specified dates. That based on what she heard said, the court should enter an order that liens, for which no filing information is provided, be wiped out.

The Plan Administrator has not provided the court with an authenticated copy of the Secretary of State Report (Fed. R. Evid. 901 et seq.) or authenticated copies of the financing statement and judgment lien asserted subordinate to the Summit lien.

As is discussed about application of the law and rules to everyone, not just those attorneys or parties who are subject to the court's ire, presentation of properly authenticated, non hearsay evidence is required before the court wipes out property rights. Additionally, the court needs the filing information to properly identify the lien and not merely avoid "whatever lien" is asserted to exist.

Sufficient Service

In reviewing the Certificates of Service, a question exists whether sufficient service has been made by service in compliance with Federal Rule of Civil Procedure 4, Federal Rules of Bankruptcy Procedure 7004, 9014(b) for the sale free and clear of their property rights and interests as creditors with a secured claim on Ingram Creek Restaurant and National Funding, Inc. by the service stated on the Certificate of Service, Dckt. 1507, as follows:

INGRAM CREEK RESTAURANT
4502 INGRAM CREEK ROAD
WESTLEY CA 95387

INGRAM CREEK RESTAURANT
P. O. BOX 2576
SPRINGFIELD IL 62708

NATIONAL FUNDING INC.
P. O. BOX 503450
SAN DIEGO CA 92150

NATIONAL FUNDING INC.
C/O SALISIAN LEE LLP
550 SOUTH HOPE ST. SUITE 750
LOS ANGELES CA 90071

With respect to the service made to unnamed persons at post office box addresses and care of a law firm, Federal Rule of Bankruptcy Procedure 7004(b) provides that for service by mail:

(b) Service by first class mail. Except as provided in subdivision (h), in addition to the methods of service authorized by Rule 4(e)–(j) F.R.Civ.P., service may be made within the United States by first class mail postage prepaid as follows:

...

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association, by mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

The court could locate National Funding, Inc. and its agent for service of process from the California Secretary of State website. Its agent for service of process is not the Salisian Lee, LLP law firm. No information concerning Ingram Creek Restaurant was available on the Secretary of State website. However, an internet search turned up several references to a restaurant in Patterson, California and also at the same street address in Westly, California.

THIRD CLAIM FOR RELIEF ABANDONMENT OF FARM EQUIPMENT

After notice and hearing, the court may order a trustee to abandon property of the Estate that is burdensome to the Estate or of inconsequential value and benefit to the Estate. 11 U.S.C. § 554(a). Property in which the Estate has no equity is of inconsequential value and benefit. *Cf. Vu v. Kendall (In re Vu)*, 245 B.R. 644 (B.A.P. 9th Cir. 2000).

The Plan Administrator requests that the court authorize the abandonment of any farm equipment that is not sold via the online auction. The Declaration of Juanita Schwartzkopf has been filed in support of the Motion and provides testimony that the projected gross sale proceeds are approximately \$150,000 to \$200,000. Declaration, Dckt. 1502, ¶ 18. Further testifying that if no buyer purchases the unsold Farm Equipment at the auction, then such unsold items would not have any liquidation value either and would only be a burden on the estate. *Id.*

The court not having authorized the employment of the auctioneer, not having approved the sale of the Property, and being inexorably tied to this multi-claim for relief Motion, determination of the relief requested is continued to the further hearing date.

DISCUSSION

The court not having an employment agreement with compensation terms that may be approved pursuant to 11 U.S.C. §§ 327, 328, 330; and not having authenticated, non-hearsay evidence relating to the two liens asserted to be subordinate to the lien of Summit, the court continues the hearing to allow the Plan Administrator to supplement the record.